IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-3831

JOHN D. EHRLICHMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the District of Columbia from an Opinion and Order of that Court affirming the conviction of JOHN D. EHRLICHMAN.

OPINIONS AND ORDERS BELOW

The opinion and order of the United States Court of Appeals for the District of Columbia Circuit of 17 May 1976 is not officially reported and is attached as Appendix A. The judgment of that Court, entered the same day, is attached as Appendix B. The Order of August 16, 1976, denying the Petition for Rehearing and Suggestion for Rehearing *en banc* is attached as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 17, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented for review by way of the Petition for Writ of Certiorari are:

1. Did the United States Court of Appeals for the District of Columbia Circuit err by approving the exclusion of evidence which would tend to establish that the search and seizure of Dr. Louis J. Fielding's office was conducted for the purpose of gathering foreign intelligence information and matters affecting the national security and, as such, was not an unlawful search and seizure.

2. Did the United States Court of Appeals for the District of Columbia Circuit err when it found that a violation of the Civil Rights Act, 18 U.S.C. §241 could be established by proof of general intent instead of a specific intent.

3. Did the United States Court of Appeals for the District of Columbia Circuit err in finding that Petitioner, John D. Ehrlichman, was not deprived of his federal constitutional right to a fair and impartial jury trial when the trial court failed to dismiss, continue the case for trial, change venue or conduct a voir dire examination necessary to ferret out prejudiced jurors in the light of unprecedented prejudicial pre-trial publicity.

4. Did the United States Court of Appeals for the District of Columbia Circuit err by affirming the trial court's ruling depriving Petitioner, John D. Ehrlichman, of full and complete discovery pursuant to F.R. Cr. P. 16, the Jencks Act, and *Brady v. Maryland* with the benefit of his counsel to assist in the review of his White House papers.

5. Whether the United States Court of Appeals for the District of Columbia Circuit erred in failing to find that Petitioner John D. Ehrlichman's rights were violated when the trial court failed to sever Petitioner's trial from that of his co-defendants when presented with inconsistent and hostile defenses by his co-defendants and when the trial court failed to adhere to the *De Luna* Doctrine.

6. Whether the United States Court of Appeals for the District of Columbia Circuit erred when it failed to consider the question of whether or not Richard M. Nixon, then President of the United States, should have been required to appear at the trial to testify and when it failed to require the President of the United States to respond to written interrogatories propounded by Petitioner John D. Ehrlichman.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth, Fifth and Sixth Amendments, United States Constitution.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV, p. 361.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V, p. 4.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." U.S. Const., amend. VI, p. 4.

STATUTES INVOLVED

The statutes involved are 18 U.S.C.A. §241, 18 U.S.C.A §3500 and 42 U.S.C.A. §1983.

> "Conspiracy against rights of citizens
>
> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> * * *
>
> "They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life." 18 U.S.C.A. §241, p. 400.
>
> "Demands for production of statements and reports of witnesses" 18 U.S.C.A. §3500, 1975 P.P. p. 110 is attached hereto as Appendix D.
>
> "Civil action for deprivation of rights
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C.A. § 1983, p. 250.

RULES INVOLVED

The rules involved are Federal Rules of Criminal Procedure, Rule 14, Rule 16, Rule 17 and Rule 21(a).

"Relief from Prejudicial Joinder

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." F.R. Cr. P. 14, 18 U.S.C.A., Rules 10-17.1, p. 255.

"Discovery and Inspection" F.R. Cr. P. 16, 18 U.S.C.A., Rules 10-17.1, p.p. 355-356 is attached hereto as Appendix E.

"Subpoena" F.R. Cr. P. 17, 18 U.S.C.A., Rules 10-17.1, pp. 468-470 is attached hereto as Appendix F.

"Transfer from the District for Trial

"(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." F.R. Cr. P. 21(a), 18 U.S.C.A., Rules 18-31, p. 43.

STATEMENT OF THE CASE

On March 7, 1974, Petitioner, John D. Ehrlichman, was indicted and charged with violating the civil rights of Dr. Louis J. Fielding, making false statements to agents of the Federal Bureau of Investigation and three counts of perjury (R. 1).* Petitioner Ehrlichman entered a plea of not guilty on March 9, 1974 (R. 4, 5, 7).

On June 26, 1974, a jury trial was commenced. On July 12, 1974, the jury returned a verdict of guilty as to Counts I, II, III and IV and not guilty as to Count V of the indictment (R. 198). Thereafter, Petitioner Ehrlichman timely filed motions for a judgment of acquittal and for a new trial. With the exception of Count II, making of false statements to the F.B.I., these motions were denied (R. 213, 214, 215, 221, 222). The trial court en-

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*Page references preceded by "R" are to the original record in the Court of Appeals.

tered a judgment of acquittal as to Count II of the indictment. (R. 215(b)). Thereafter, Petitioner filed his Notice of Appeal to the United States Court of Appeals for the District of Columbia (R. 231). On May 17, 1976, the United States Court of Appeals for the District of Columbia entered its Opinion and Order affirming the conviction below. Thereafter, on June 1, 1976, Petitioner filed and served a timely Petition for Rehearing and Suggestion for Rehearing *en banc*. That Petition and Suggestion were denied by the United States Court of Appeals for the District of Columbia Circuit on the 16th day of August, 1976.

STATEMENT OF THE FACTS

Count I of the Indictment charged Petitioner Ehrlichman with conspiring to interfere with the civil rights of Dr. Louis J. Fielding by approving an unreasonable search and seizure of Dr. Fielding's offices in Beverly Hills, California, and, thereafter, concealing the same. The facts and circumstances which led to the alleged search and seizure in question, and alleged concealment thereof, are as follows:

In mid-June, 1971, the White House learned that one version of the 47 volume secret study of the Viet Nam War prepared by a group of experts and employees within the Department of Defense, commonly known as the "Pentagon Papers", had been delivered to the *New York Times* and other newspapers. (R. 48/1). In response to that theft, the President of the United States instructed Petitioner Ehrlichman to act as a liaison between the President and those in the Department of Justice, who were prosecuting lawsuits in an attempt to restrain the publication of these documents. (R. 206/1822).

During the week following the theft of the Pentagon Papers, Mr. Ehrlichman met with the President and Dr. Henry Kissinger, then the President's senior advisor on foreign affairs, to discuss the theft and its consequences. Dr. Kissinger advised the President and Mr. Ehrlichman that Daniel Ellsberg, the alleged perpetrator of the theft, was a fanatic, a drug user, and was privy to critical U.S. defense secrets of a current nature including, but not limited to, nuclear deterrent targeting. (R. 48/2). Dr. Kissinger gave both the President and Mr. Ehrlichman the impression that Ellsberg's responsibility for the theft of the Pentagon Papers presented a very serious national security problem. (R. 48/2). Dr. Kissinger told the President that the theft had made very difficult this nation's relations with those Allies with whom we shared classified information. During and as a result of those meetings, both the President and Dr. Kissinger were deeply concerned over the implications of the theft. (R. 48/2).

At the President's instructions and pursuant to a delegation of Presidential power in this matter, Mr. Ehrlichman told the Department of Justice to restrain the publication of the Papers and to conduct a vigorous investigation to uncover those guilty of the theft and compromise of the defense secrets. (R. 48/2). As the litigation to restrain publication of a part of the Pentagon Papers in the newspapers progressed (June 15-July 7), various "damage assessments" were prepared by national security exports. One such damage analysis was prepared by Admiral Guyler, Director of the National Security Agency, in Affidavit form describing how the Pentagon Papers theft had damged the Nation's security.[1] The President was informed of each of

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[1] This affidavit was filed with the Court; the Supreme Court has ordered it held under seal. (R. 206/2007).

these assessments. (R. 48/5). Thereafter, on July 6, 1971, the President and Mr. Ehrlichman met with the Attorney General. The latter advised that Dr. Ellsberg had Communist ties and was probably a part of a larger conspiracy. (R. 48/3).

At approximately the same time, the Assistant Attorney General for internal security called Mr. Ehrlichman to advise him that an "intercept" established that some or all of the Papers had been delivered to the Soviet Embassy in Washington. Mr. Ehrlichman in turn informed the President of this call. (R. 48/3). Mr. Ehrlichman also was made aware of F.B.I. reports which suggested that a group in Cambridge, Massachusetts had caused the Pentagon Papers to be duplicated and that a member of the conspiracy was an employee of the *New York Times.*

In the face of the urgency of the problem, then developing, the President began to question the ability of the F.B.I. to properly investigate this matter. Mr. Nixon indicated dissatisfaction with the F.B.I. Specifically, the Attorney General had advised Mr. Ehrlichman that F.B.I. Director, J. Edgar Hoover, had disciplined one of the F.B.I.'s top officials for ordering an interview of Ellsberg's father-in-law, Louis Marx. (R. 48/34). As a result of his concern about the apparent ineffectiveness of the Federal Bureau of Investigation, and his dissatisfaction with a diffusion of responsibility, the President instructed Petitioner Ehrlichman on July 2, 1971, to recruit someone to take full responsibility for the management of the Ellsberg matter and for the making of recommendations as to the prevention of further disclosures of classified information. (R. 48/4; R. 206/1822). During the week of July 7, 1971, the President decided that Egil Krogh, Jr. and David Young would have the responsibility for managing the project. (R. 206/1823; R. 202/957-958; R. 203/1266).

On Saturday, July 17, 1971, Petitioner Ehrlichman met with Krogh and Young and advised them of their assignment to manage this project, that the matter was considered by the President to be of the utmost importance, and that very serious national security issues were at stake. (R. 203/1266).

During the week of July 26, 1971, Howard Hunt[2] was assigned to assist Krogh and Young. (R. 201/742-3). Mr. Hunt testified that the Unit as part of its responsibility to prevent further unauthorized disclosures of classified information was engaged in a variety of enterprises, the principal one of which seemed to be the acquisition of all files and source material on Daniel Ellsberg because of generalized concern over Ellsberg's motive for violating the National Security Act when he released the documents to the newspapers and possibly to a foreign power. (R. 201/745-746).

Hunt suggested to other members of the Unit that in order to evaluate whether or not Dr. Ellsberg was acting alone or part of a conspiracy and in order to determine whether he would have the propensity to disclose further national defense information, the C.I.A. should be requested to prepare a psychological profile of Daniel Ellsberg (R. 202/943). As a result, on July 27, 1971, Young and Krogh advised Ehrlichman that they had instructed the C.I.A. to do a thorough psychological profile on Ellsberg. Government Ex. 5. Young and Hunt discussed the possibilities

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[2] At approximately the same time as the unit was formed, Charles Colson employed E. Howard Hunt as a Consultant to the White House. (R. 201/733). Mr. Hunt was introduced to Mr. Ehrlichman by Colson on July 6, 1971, in connection with a number of projects unrelated to this case. Mr. Hunt never met with Ehrlichman either before or since. (R. 201/734).

of a covert operation to examine the files being held by Ellsberg's psychiatrist, Dr. Fielding, to assist in this profile. (R. 202/960). Hunt recommended to Colson that the Special Investigation Unit obtain Ellsberg's files from his psychiatric analyst and also investigate or contact Ellsberg's I.S.A. and Rand colleagues. (R. 201/754).

Hunt, Liddy and Young discussed the manner in which they could obtain Ellsberg's files from Dr. Fielding. Dr. Fielding previously had declined to be interviewed by the F.B.I. Hunt therefore recommended that a "black bag job" (a surreptitious entry) be undertaken. (R. 201/757). The F.B.I. had formerly performed such entries, but those in the Unit were under the impression that the F.B.I. was no longer engaged in such activities. (R. 201/758). The C.I.A. was not requested to conduct such an entry because operations within the United States were usually regarded as beyond the scope of the agency's function.[3] (R. 201/759).

After preliminary discussion, the suggested "black bag job" was brought to Mr. Krogh's attention. (R. 201/760). Hunt advised Krogh and Young that a feasibility study was necessary to determine whether or not an entry could be effected. (R. 201/761; R. 203/1294). During these discussions, Krogh and Young insisted that no one directly or indirectly employed by the White House was to participate in the actual entry. (R. 201/761-2); (R. 203/1288-1292).

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[3] The unit was apparently unware of the fact that in 1971 the C.I.A. was actively engaged in this type of activity. See *United States v. Barker*, Case No. 74-1883 (decided by the Court of Appeals for the District of Columbia Circuit on May 17, 1976). Appendix G.

Young testified at trial that on or about August 5, 1971, he and Krogh raised with Ehrlichman a proposal for a covert operation to investigate Ellsberg. (R. 202/963). Young testified that Ehrlichman was told that Hunt had suggested examining Ellsberg's file as a way of getting a handle on the problem. Ehrlichman's response was "let's think about it." (R. 202/968).

On August 11, 1971, the C.I.A. concluded its first psychological assessment on Ellsberg's personality. (R. 202/973). Young reviewed that profile and determined that it was very superficial. As a result, he prepared Government Exhibit 12. That exhibit, dated August 11, 1971, recommended that:

> [A] covert operation be undertaken to examine all the medical files held by Ellsberg's psychoanalyst.

The exhibit reflects that Mr. Ehrlichman approved the recommendations and noting the following: "Provided that it is not traceable back to the White House." On August 25, 1971, Young sent a memorandum to Ehrlichman indicating that Hunt and Liddy had gone to California. (R. 202/995).

On August 27, 1971, Mr. Ehrlichman sent a memorandum written by Young and addressed to Colson in connection with the Ellsberg investigation entitled, "Subject, Hunt-Liddy Special Project Number One." That memorandum stated that "under the assumption the proposed undertaking by Hunt and Liddy would be carried out and would be successful, I would appreciate receiving from you by next Wednesday, a game plan on how and when you believe the material should be used." (R. 202/1000).

Upon Hunt's and Liddy's return from California, they met with Krogh and Young and advised them of the feasibility of the undertaking, and reviewed with them a detailed proposed method of conducting the surreptitious entry as well as a proposed budget for the operation. At the conclusion of the meeting, on August 30, 1971, Young testified that he and Krogh called Ehrlichman who was in New England on vacation. While Young recalled telling Ehrlichman that the investigators and Krogh felt the "operation" could be undertaken, (R. 202/1028-1030) Krogh testified that Ehrlichman was not told at the time that the Unit was going to enter Dr. Fielding's office. (R. 204/1367). Mr. Ehrlichman indicated that he had no recollection of such a telephone call. (R. 206/1954).

Thereafter, Hunt and Liddy travelled to Beverly Hills, California, and engaged in the surreptitious entry in question. It is uncontroverted from the record that Mr. Ehrlichman never contemplated any type of entry, much less the type of entry which was undertaken by the members of the entry team. (R. 206/2004-2006). In this regard, Krogh stated that the members of the entry team had gone beyond any instructions given to them with respect to where they should be operating. (R. 203/1308-9). Young testified that both he and Krogh were surprised at what had occurred. (R. 202/1032). When Krogh apprised Ehrlichman of what had occurred, Ehrlichman expressed great surprise and stated that their actions had been excessive. (R. 203/1310). Ehrlichman stated that Krogh telephoned him and advised that Hunt or Liddy or those working with them had gone into Dr. Fielding's office and had attempted to mask what they had done by making it appear as though a drug burglary had taken place. Krogh stated that Hunt and Liddy wished to conduct yet another search, of Fielding's apartment, but Krogh

thought they should not. Krogh was very chagrined and upset at the incident and was sorry that they had done it. Krogh testified that, at the time, he told Ehrlichman that he felt they had exercised very poor judgment. Krogh stated that he was remorseful in the process of recounting the incident to Ehrlichman. (R. 206/2014). Ehrlichman testified that he stated to Krogh that he disapproved and that he agreed with Krogh that no one should do anything more. (R. 206/2016). Ehrlichman stated that Krogh and Young and the others involved with the incident had exercised incredibly bad judgment and expressed his very great unhappiness and surprise at what had taken place. Ehrlichman stated:

> "It was just totally out in left field from anything I had contemplated." (R. 206/2016).

On cross-examination, Ehrlichman was asked whether or not he had contemplated such activities when he had approved a "covert operation" to investigate. Ehrlichman responded that "covert" to him meant a *private* investigation which did not contemplate that such a search would be undertaken. Ehrlichman believed that the records could have been examined simply by request; *i.e.*, by some third party going to a doctor and asking to see the records. He believed that the psychoanalyst who had Ellsberg's papers might be an employee of the Rand Corporation and that these investigators (Hunt and Liddy) could go directly to Rand to find out about Ellsberg. If the records were available, the Rand's management could be asked for them. (R. 206/2006). Ehrlichman did not know that the operation involved any illegal entry or search of Dr. Fielding's offices. (R. 206/2006). Ehrlichman assumed that since the unit was made up of two trained and experienced investigators, they would employ normal investigation techniques

in the same way as the F.B.I. and other governmental agencies did. (R. 206/2009).

Mr. Young had meetings with Mr. Ehrlichman in March, 1973, because he, Young, was going to resign. (R. 202/1048). Ehrlichman testified that he requested a meeting with Young because of a blackmail attempt by Hunt in connection with the Watergate Affair.[4] Young's secretary took a briefcase of files to Mr. Ehrlichman's office on or about March 26. (R. 202/1049). Mr. Ehrlichman stated at trial that the files had come over on or about March 22 at Young's suggestion, not at Ehrlichman's request and, when Ehrlichamn saw he could not review them because of his lack of time and an imminent departure to San Clemente, he sent them back to Young on March 23. (R. 207/2070). Young testified that he met with Ehrlichman on March 27. According to Young, Ehrlichman told him that he (Ehrlichman) had removed those memoranda from the file because they showed too much forethought with respect to the Ellsberg break-in. (R. 202/1052). Mr. Ehrlichman testified that he did not recall saying this to Young and that he had removed no memoranda from the file. (R. 207/2072). In fact, no documents were removed from the files. The only papers destroyed were those altered by David Young to protect himself. (R. 202/1037-8; see also, Gov't Ex. 22A, 22B, 22C). All the memoranda in

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[4] On or about March 22, 1973, Mr. Ehrlichman discussed with Young and Krogh the infamous Hunt blackmail threat. Hunt sent word that if he were not paid over $100,000 he would disclose "the seamy things" that he had done while he was in the employ of the White House. Ehrlichman feared that Hunt might be referring to a broad range of secret matters, beyond the Ellsberg matter, including other very sensitive, classified information known to those in the Unit. (R. 207/2064).

question were kept secure by Trudy Brown, the White House Custodian of Records. (R. 207/2072). Under the White House filing procedure someone marked the box "Ehrlichman" and placed files in it including a file folder marked "Leaks". The "missing" documents remained, at all times, in that folder. (R. 207/2075, 2108). Prior to and during trial Ehrlichman sought production of that file folder, but a subpoena issued for the same was quashed.

Krogh testified that, following the Hunt blackmail threat, he had a conversation with Mr. Ehrlichman at which time Krogh characterized the Fielding break-in as an "illegal frolic" in which the members of the Unit had gone far beyond their authority. (R. 203/1316-1317).

On or about March 22, 1973, (two days after the blackmail threat), Krogh received a telephone call from Ehrlichman during which Ehrlichman indicated that the President was aware of what had taken place in connection with the Fielding break-in and that the President considered that matter one of highest national security. Accordingly, Krogh was instructed that the President had directed him not to discuss it with anyone. (R. 203/1318). Krogh testified that Ehrlichman informed him, in late April, 1973, that the President felt very strongly that it was a matter of national security and that he had so informed Henry Peterson, then Assistant Attorney General of the United States. (R. 203/1319).

In May, 1973, Egil Krogh submitted an Affidavit to the Honorable Matthew Byrne, United States District Judge for the Central District of California, in connection with the prosecution of Ellsberg for the theft. Krogh acknowledged in that Affidavit that he bore personal responsibility for the operation in question. (R. 204/1333). In Krogh's letter of resignation to the President, as Under-

secretary of Transportation, Government Exhibit 26, paragraph 1, Krogh admitted that this mission was his responsibility, in excess of his instructions, and without the knowledge or permission of any superior. (R. 204/1333-1334).

William Treadwell, Krogh's attorney, testified at trial that he had learned from both Krogh and Young, separately, that Mr. Ehrlichman neither approved of the surreptitious entry into Dr. Fielding's office nor had prior knowledge of it. (R. 207/2129).

In Count II, Ehrlichman was charged with making false statements to agents of the F.B.I., on or about May 1, 1973, when, during an interview, he stated he had not seen anything on the Pentagon Papers investigation for over one year. This statement was true. There is no evidence to the contrary. Young sent papers to Ehrlichman's office in 1973, but there was no evidence that he looked at them.

Count III charged Mr. Ehrlichman with making a false statement before the Grand Jury when he stated that he did not recall hearing of the psychological profile until after the break-in into Dr. Louis J. Fielding's office. Admittedly, the testimony was factually incorrect. However, during the Grand Jury testimony the prosecutor did not show Ehrlichman the August 11 memorandum. Subsequent to his May Grand Jury testimony, which came on the heels of his resignation, (a very difficult time in his life), he spent extensive time conducting research in preparation for testimony before the Senate Select Committee on Presidential Campaign Activities as well as other Congressional committees. On June 12, 1973, a news story led him to search an impounded White House file. There, he saw Exhibit No. 13 for the first time in two years. He then knew the testimony he had given on the question of se-

quence was in error. As a result, Ehrlichman attempted to take such steps as were necessary to correct the record. (R. 206/1859). He and his attorney wrote letters to Senator McClellan, then Chairman of the Senate Committee on the C.I.A., to correct testimony given there as to the time of his knowledge of the profile. (R. 206/1860). Ehrlichman appeared before the Grand Jury again in September, 1973, at which time he attempted to clarify the record concerning this sequence of events.

The prosecutor knew of the August 11 memorandum (Exhibit No. 13) in May, but did not show it to Ehrlichman. When the Petitioner discovered it, he promptly set the record straight. Between the May and September Grand Jury appearances, Ehrlichman's five days of televised testimony before the Ervin Committee included a description of his knowledge of the profile *before* the break-in occurred; his research had, by then, led him to the memorandum. Thus, he publicly corrected the record as well.

At the conclusion of the trial, the jury returned a verdict of guilty as to Counts I, II, III and IV of the Indictment and not guilty as to Count V of the Indictment. Subsequently, the trial court entered a judgment of acquittal with respect to Count II of the Indictment.

REASONS FOR ALLOWING THE WRIT

1. The United States Court of Appeals for the District of Columbia Circuit erred by approving the exclusion of evidence which would tend to establish that the search and seizure of Dr. Louis J. Fielding's office was conducted for the purpose of gathering foreign intelligence information and matters affecting the national security and as such was not an unlawful search and seizure.

The question of searches and seizures in the context of national security and foreign intelligence information gathering represents an issue of grave and serious national importance. The standards applicable to such searches and the consequences of a violation of such standards must represent a potential restriction of significant magnitude to this nation's ability to protect its sovereignty. At stake is the delicate balance between individual liberty and this nation's ultimate ability to provide these freedoms.

The decision below requires such warrantless searches to be expressly approved by either the President or the Attorney General. Read in light of *Zweibon v. Mitchell*, ___ U.S.App.D.C. ___, 516 F.2d 594 (1975), such a search, even if so approved, must be limited to only those in collaboration with a foreign power. The dilemma so created by decisions in 1975[5] and 1976[6] require that federal agents discontinue their on-the-spot investigations to such bureaucratic transmissions of a request for Presidential Approval or perhaps the approval of the

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[5] *Zweibon v. Mitchell, supra.*

[6] *U.S. v. Ehrlichman,* Appendix A.

Attorney General at the risk of diverting their investigation with a concomitant adverse impact upon this nation's national security.

The significance of the problem is magnified by the agent's concern over potential criminal prosecution should an error in judgment occur. To this point, the Court of Appeals rejected both the requirement of specific intent and the defense of good faith and probable cause, as discussed below.

Here Petitioner had received a broad mandate of Presidential power which included authority to approve a covert operation of the type contemplated by Mr. Ehrlichman on August 11, 1971. The summary rejection of the propriety of this search represents a significant departure from the historical pattern followed until the decision by the Court of Appeals below. Because of the potential drastic impact which that opinion may have on national security, Petitioner respectfully submits this question should be reviewed by the Court.

2. The United States Court of Appeals for the District of Columbia Circuit erred when it found that a violation of the Civil Rights Act, 18 U.S.C. § 241 could be established by proof of general intent instead of a specific intent.

Specific intent is a critical and indispensable element of an offense under 18 U.S.C. §241. Yet, that element was virtually excluded as part of the offense by the Court below. The United States Court of Appeals for the District of Columbia in its Opinion rejected the concept of specific intent and held that under *Screws v. United States,* 325 U.S. 91, 65 S. Ct. 1031, 89 L.Ed. 1495 (1945), to prove a violation of 18 U.S.C. §241, a two-fold test must

be met; that the constitutional right be clearly delineated and plainly applicable under the circumstances of the case, a legal question; and that the defendant committed the act with a general "intent" of depriving the citizen victim of his federally protected rights, a jury question. App. A., p. 17. The court's analysis accepted the existence of probable cause as possible, refused to consider whether the national security exemption extended to physical intrusions as compared to electronic surveillance and found a violation of the Fourth Amendment because there was no specific authorization of the search by either the President or the Attorney General.

Even accepting the court's rejection of specific intent to violate constitutional rights, the first issue under the *Screws* test established by the court below must be whether in August, 1971, the national security exemption clearly required federal agents to obtain the prior approval of the President or the Attorney General. This requirement was not clearly delineated in 1971 and the failure to obtain such prior authorization could not result in a criminal conviction without rendering 18 U.S.C. §241 as being void for vagueness as applied. *United States v. Guest,* 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). The court below incorrectly found that the first test of *Screws* was satisfied. In August 1971, only Justice White in his concurring opinion, in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) indicated that such prior authorization might be required. Justice Stewart indicated that the standard for warrantless searches in this area was an open question. *Giordano v. United States,* 394 U.S. 310, 314-315, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1969). Justices Douglas and Brennan expressed disagreement with the exemption and therefore did not discuss the standards for its applica-

tion. *Katz v. United States, supra* at 359. Thus, in 1971 as today, no clearly defined procedures have been set forth guiding the scope of the national security exemption.

A further measure of the absence of a clear delineation of this question is the Richard Helms matter noted by the court below in *United States v. Barker,* Case No. 74-1883, decided May 17, 1976. See Appendix G. Director Helms relying upon his statutory responsibility to protect intelligence sources and methods from unauthorized disclosure, approved a surreptitious entry into a photographic studio in Fairfax City, Virginia. In the lower court's opinion in *Barker,* the court noted that in 1971, there could not be one Fourth Amendment for Richard Helms and another for Bernard Barker and Eugenio Martinez. Yet, the Fourth Amendment as applied to these government agents appears to be substantially different than that applicable to Petitioner in the instant case. The government has asserted that Petitioner operated under a Presidential mandate to stop the unauthorized disclosure of classified information, and thereby approved the surreptitious entry into Dr. Fielding's office. This contention is substantially similar to that rejected by the Department of Justice in the Helms matter and to that rejected by the court below in the *Barker* decision. Thus the certainty required by *Guest* could not be supported by the court's decision in *Barker* nor could it be supported by the Helms affair.

The court below found legal certainty and in turn sufficient intent based upon the belief that the exemption had been constantly conditioned upon the express approval by the President or the Attorney General. However, such references were neither constant, numerous or even clear in 1971 much less, today. Even in

United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974), the court referred to the powers of the Executive, thereby supporting the proposition that the President has the power to broadly delegate this national security search to others beyond the Attorney General as he had in this case to Mr. Ehrlichman. Moreover, the President's powers in this area are derived from his constitutional powers as Commander-in-Chief and his duty to conduct this nation's foreign affairs. As to the exercise of these powers, the Attorney General is not and has never been well equipped to serve as the Presidential delegate as have other members of the Executive Branch. The government, in its brief below, had recognized that cases referring to this exemption and the condition of approval by the President or Attorney General were not decided until 1973 or thereafter. See *Brief for the United States,* pp. 42-43. Even the apparent dispute between the Watergate Special Prosecutor's position that the national security exemption does not exist and that the Attorney General's position that the exemption required approval by either the President or the Attorney General in their briefs below further amplifies the lack of a clearly defined right in 1976 as required by *Guest,* much less 1971. Thus, the clear right which prevents the vagueness doctrine as announced in *Guest* from applying rests only upon Justice White's dicta in *Katz, supra,* Justice Stewart's refusal to consider the exemption in *Giordano,* the refusal of Congress to consider the issue in passing upon the Omnibus Crime Control and Safe Streets Act of 1968, and 18 U.S.C. §2510 et. seq. While in 1976 and in future years such special approval may be reasonable and serve a prophylactic effect against abuse by over delegation, it would be fundamentally inconsistent with *Guest* to define now the exemption and retroactively to apply it to Petitioner, John D. Ehrlichman.

The Court below further rejected the defense of good faith and reasonable reliance applying a different standard to Bernard Barker and Eugenio Martinez in *United States v. Barker, supra,* from that applied to Petitioner Ehrlichman. While rejecting the defense of good faith and probable cause as established by *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) in the instant case, the lower court fashioned that defense under the concept of good faith, and reasonable reliance upon a superior's apparent authority. However, the defenses are the same and should have been equally applied in both this case as well as *United States v. Barker, supra.* In *United States v. Barker,* the lower court held that while a mistake of law does not generally constitute a defense, where in a case of this nature, such a mistake is made, it constitutes a defense if objectively reasonable under the circumstances. Petitioner Ehrlichman was precluded from adducing evidence which would have established that his conduct was objectively reasonable under the circumstances. The trial court's Order precluding discovery unduly restricted Petitioner's ability to further develop the facts demonstrating the defense. *United States v. Ehrlichman,* 376 F.Supp. 39 (D.D.C. 1974). However, as was the case with Barker and Martinez, Petitioner Ehrlichman demonstrated facts sufficient to justify his reasonable belief that he had the authority to authorize the search into Dr. Fielding's office. Thus, the defense was equally available to Petitioner Ehrlichman since facts existed justifying his reasonable belief that he had the authority to authorize a search of Dr. Fielding's office and a legal theory on which to base a reasonable belief that such authority existed. See *United States v. Barker, supra,* at pp. 14-15.

Petitioner likewise satisfied the second element of the defense as fashioned by the Court of Appeals – the existence of a legal theory on which to base a reasonable belief that

he possessed authority to lawfully approve that which he was accused of, a warrantless search of Dr. Fielding's offices. This question turns on not whether such authority actually existed but to the reasonableness of such a belief in 1971. As noted by the court below in its opinion in *Barker, supra,* the President would always have such authority under the Constitution and that has always been the clear position of the Executive Branch. In 1971, regardless of the subsequent judicial clarification of the exemption, to the extent it exists, it was quite reasonable for Petitioner Ehrlichman to believe that searches of this nature were within the ambit of his authority, as was the case with former C.I.A. Director Helms. See, *United States v. Barker, supra* at 19-20. Since the reasonableness of the belief is the essence of the defense and sufficient facts existed to demonstrate the same, Petitioner Ehrlichman should have been permitted to present this defense to the jury.

3. The United States Court of Appeals for the District of Columbia Circuit erred in finding that Petitioner, John D. Ehrlichman, was not deprived of his federal constitutional right to a fair and impartial jury trial when the trial court failed to dismiss, continue the case for trial, change venue or conduct a voir dire examination necessary to ferret out prejudiced jurors in the light of unprecedented prejudicial pre-trial publicity.

The question of prejudicial pretrial publicity is a significant question of national importance since it arises in virtually every case of public interest being tried in the courts today. While there have been a number of pronouncements by this Court in terms of identifying the problem of prejudicial pretrial publicity there has not yet been

a clear standard provided by this Court which trial courts can adhere to in meeting their obligation to determine whether or not prejudicial pretrial publicity exists.

There is no question but that the pretrial publicity surrounding this case on the eve of trial was overwhelming. Petitioner Ehrlichman had been subjected to a "quasi trial" before the Senate Select Committee on Presidential Campaign Activities in which there had been a well-publicized denunciation of Mr. Ehrlichman as a liar by Senator Inouye of Hawaii. In the face of virtually daily coverage both in the newspapers as well as other public media, the jurors came to the trial virtually bombarded with an avalanche of overwhelming pretrial publicity.

Considering the nature of such publicity, the trial court failed to conduct any meaningful voir dire to determine whether or not there had been any deeply-held convictions against Petitioner Ehrlichman. By conducting limited questioning restricted to a juror's self-declaration of a predisposition towards guilt, the trial court ignored the fundamental principles of psychology recognized by the Courts of Appeal in *Delaney v. United States,* 199 F.2d 107 (1st Cir. 1952), and in *Silverthorne v. United States,* 400 F.2d 627 (9th Cir. 1968). Whether or not a self-protestation of fairness and neutrality made by a juror in the face of overwhelming pretrial publicity is sufficient unto itself to excuse the court from asking any further voir dire and to accepting the presumption that a fair and impartial jury exists is the issue. Petitioner respectfully submits that a decisive probing voir dire under such circumstances is the least required.

4. The United States Court of Appeals for the District of Columbia Circuit erred by affirming the trial court's ruling depriving Petitioner, John D. Ehrlichman, of full and complete discovery pursuant to F.R. Cr. P. 16, the Jencks Act, and *Brady v. Maryland* with the benefit of his counsel to assist in the review of his White House papers.

The government refused to produce Mr. Ehrlichman's White House records under Rule 16, F.R.Cr.P., or under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). The government defended their own noncompliance by submitting an affidavit of J. Fred Buzhardt, then counsel to the President, to the effect that the documents were insignificant and not material. Petitioner Ehrlichman attempted to establish facts which would have controverted the *Brady* affidavit of the Government's designated agent, J. Fred Buzhardt. The trial court *summarily* refused to receive Petitioner's testimony or evidence on this question.[7] In this manner, Mr. Ehrlichman was deprived of the opportunity to factually establish the Government's willful non-compliance with the duty to produce relevant and material evidence.[8]

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[7] R. 149/Hearing on Satisfaction of *Brady* Requirements as to Defendant Ehrlichman. June 14, 1974.

[8] *See,* Joint Appendix, pp. 749-758; *see also,* R. 159/1, Ehrlichman's Motion for Issuance of a Subpoena Duces Tecum on the President of the United States for the Production of Certain of his Personal Papers which are in the Possession, Custody and Control of the President, and Memorandum in support thereof, Joint Appendix, pp. 236-245.

The materiality of this noncompliance is illustrated by the Government's failure to produce the "Leaks" file.[9] One of the essential facts in both the charge under 18 U.S.C. §241 and the charges under 18 U.S.C. §1623 stemmed from the testimony of David Young. Mr. Young testified at trial that Petitioner Ehrlichman had removed certain documents in March, 1973 from the file maintained on this subject because they reflected too much forethought. The Government suggested that the presence of those documents in a separately designated file – the "Leaks" file – amplified Mr. Young's testimony. Mr. Ehrlichman sought production of the actual file folder not to show *what* it was, but rather to indicate (1) that the documents and file folder existed (i.e., that they had not been destroyed), and (2) where in the White House the material could be found and (3) that the designation "Leaks" on the folder was not in Mr. Ehrlichman's handwriting and had been created by someone else, apparently subsequent to the physical taking of his record by the F.B.I. upon his resignation of office on May 1, 1973. The refusal to permit or require the production of this indispensable evidence not only left the Young-created impression with the jury that the records had been removed and destroyed, but also precluded Petitioner Ehrlichman from establishing that he had not participated, in any way, in the destruction or removal of documents. This critical evidence should have been produced by the Government in discovery.

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[9] Petitioner's proffer was, however, not limited to this one item; there were many other material errors in the Buzhardt Affidavit; *see* R. 149/Summary of Omitted Items Requested by Defendant Ehrlichman, Joint Appendix pp. 253-258.

The trial court further erred when it refused to allow Mr. Ehrlichman to have the benefit of counsel to assist him in the review of his papers which were in the possession of the White House. This Court has noted in *Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed. 176 (1969) that only defense counsel can appropriately appreciate the nuances involved in the strategy of a case. Mr. Buzhardt, a Government lawyer, was certainly no substitute for the Petitioner's counsel in the document review; nor could the fact that Mr. Ehrlichman is an attorney sufficiently excuse the exclusion of his counsel from the document review. An attorney charged with a criminal violation must be entitled to the effective assistance of counsel as a matter of basic due process. Essentially, the court below accepted the government's position on production without affording Mr. Ehrlichman an opportunity to be heard in opposition. Such a result is fundamentally inconsistent with due process of law and this issue should be considered in identifying an appropriate procedure for the court below to enforce, *Brady v. Maryland, supra,* Rule 16 and the Jencks Act.

5. The United States Court of Appeals for the District of Columbia Circuit erred in failing to find that Petitioner, John D. Ehrlichman's rights were violated when the trial court failed to sever Petitioner's trial from that of his co-defendants when presented with inconsistent and hostile defenses by his co-defendants and when the trial court failed to adhere to the *De Luna* Doctrine.

The court below erred when it failed, on several grounds, to sever John D. Ehrlichman from his co-defendants. On May 1, 1974, Petitioner Ehrlichman apprised the court, in his Motion for Severance (R. 59), that co-defendants Liddy,

Martinez and Barker would assert defenses inconsistent and hostile to his own. Ehrlichman argued that if they were tried jointly prejudice would result. Despite this contention, the trial court refused to sever. (R. 164/391-400).

When the inconsistent and hostile defenses were asserted at trial, the court refused to sever Ehrlichman from his co-defendants. As a result, Ehrlichman was forced to face prosecution from both the Government and from the contentions, argument and evidence adduced by his co-defendants.

During the trial, Liddy, Martinez and Barker asserted that they had acted under orders from a superior and that, therefore, their conduct was lawful. In his opening statement, Liddy's attorney, Mr. Maroulis, argued that Liddy had been acting upon the lawful order of his superior and directly referred to Ehrlichman as a superior. As a result, Mr. Maroulis contended that his client could not be a member of a criminal conspiracy. (R. 201/599-600). On several occasions, Liddy pointed to Ehrlichman as the superior who had approved this operation. (R. 201/598); (R. 209/2432B); (R. 209/2438). In this manner, Liddy argued to the jury that he was acting from the beginning under the authority and order of Ehrlichman and that, if any person was responsible for criminal misconduct, it could not be Liddy but rather Ehrlichman. As a result, Liddy became the second prosecutor in this case.

Liddy was joined by a third and fourth prosecutor in Barker and Martinez. These two defendants contended that they had been acting pursuant to what they believed to be an official request from the White House and, more specifically, from E. Howard Hunt. (R. 207/2209; R. 207/2170). Mr. Hunt testified that Messrs. Barker and Martinez had every reason to believe that the request they

received to participate in the operation was an official White House request. (R. 207/2158-2159). As a result, Barker and Martinez contended to the jury that they acted pursuant to the lawful orders of the superior and, consequently, could not be considered members of the criminal conspiracy. Since Ehrlichman was the only "superior" in this trial, it evolved that Ehrlichman faced prosecution not only from the Government but also his co-defendants at trial.

A second ground upon which the trial court erred in failing to sever Petitioner Ehrlichman was under the doctrine of *DeLuna v. United States,* 308 F.2d 140 (5th Cir. 1962). The *DeLuna* Court held that where one co-defendant, whose defenses are at odds with that of a second co-defendant, asserts his Fifth Amendment privilege against self-incrimination, counsel for the second co-defendant cannot make fair comment upon that fact and severance is in order. At trial, Liddy refused to testify. (R. 208/2288-2289). Ehrlichman, faced with inconsistent defenses asserted by defendant Liddy's attorney, sought to argue to the jury with respect to Liddy's failure to take the stand. Prior to final argument, the trial court instructed counsel for Petitioner Ehrlichman that the court would not permit any argument to be made as to defendant Liddy's failure to take the stand. (R. 208/2309-2310). As a result, Petitioner Ehrlichman was faced with the difficult prospect of allowing Liddy's defense to the effect that he was relying upon orders which originated from Ehrlichman to remain unchallenged and uncommented upon as to Liddy's motives for such a contention.

From the foregoing, it is apparent that the trial court erred in several ways with respect to severance. As a result, Petitioner Ehrlichman was deprived of a fair trail when the court refused to sever him despite the fact that co-defendants Liddy, Barker and Martinez asserted defenses incon-

sistent and hostile to his own and that Mr. Ehrlichman, when faced with the inconsistent defenses asserted by the attorney for Defendant Liddy, was prohibited by the court from arguing to the jury with respect to Mr. Liddy's failure to take the stand.

6. The United States Court of Appeals for the District of Columbia Circuit erred when it failed to consider the question of whether or not Richard M. Nixon, then President of the United States, should have been required to appear at the trial to testify and when it failed to require the President of the United States to respond to written interrogatories propounded by Petitioner, John D. Ehrlichman.

On the eve of trial, Petitioner Ehrlichman indicated to the court that he intended to call as a defense witness Richard M. Nixon, then the President of the United States. The trial court expressed its belief that it would be inappropriate to require the President to appear and testify at trial in an effort to avoid a constitutional conflict between the judiciary and the executive. Accordingly, the court instructed counsel to submit proposed written interrogatories.

Ehrlichman submitted proposed interrogatories. The first set of these interrogatories (R. 193) contained forty-eight specific questions concerning the President's instructions to form a Special Investigations Unit, the responsibility of persons assigned to that Unit, the information transmitted to the President by members of the Unit, together with Ehrlichman's general responsibilities. In addition, there were a number of questions which went to the issue of concealment as charged in the

indictment.[10] In this regard, certain interrogatories centered around the President's instructions not to disclose any of the activities of the Unit lest the disclosure of the same result in the revealing of certain highly classified and lawful activities of the Unit. (*See,* testimony of Young: R. 202/1065; and of Krogh: R. 203/1318-1319). Additionally, there were a number of interrogatories propounded which would have established that Ehrlichman did not entertain the requisite specific intent to violate the Constitutional rights of Dr. Louis J. Fielding.

The trial court declined to accept those interrogatories and, instead, required Ehrlichman to submit amended interrogatories. In the second set of interrogatories (R. 194), Ehrlichman requested that the President disclose the nature and circumstances surrounding the formation of the Unit, instructions given to members of that Unit, information received by members of that Unit and restrictions on any discussions or testimony about the activity of the Unit. Other interrogatories asked the President to disclose whether or not he instructed the Unit to investigate the affairs of Ellsberg and, if so, the nature of his instructions. The interrogatories also went to the issues of specific intent and concealment. As in the case of the original interrogatories, the trial court refused to submit them to

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[10] The indictment charged that the conspiracy in question was aimed not only to violate Dr. Fielding's rights, but further to conceal that violation. In connection with the same, it was material to the defense to establish that the concealment of the activities of the Special Investigations Unit was by direct order of the President of the United States, based upon the President's judgment that the disclosure of such activities might reveal certain highly classified information.

the President. Consequently, Mr. Ehrlichman, reserving all his rights, submitted four interrogatories (R. 195). These stated:

> 1. Please state the circumstances surrounding the formation of the Special Investigating Unit of the White House.
>
> 2. What instructions, if any, did you give to John Dr. Ehrlichman, Egil Krogh, Jr., or David R. Young as to the activities of this Unit?
>
> 3. Please state the circumstances surrounding each instruction given by you instructing any person not to discuss the activities of the Special Investigating Unit by reason of national security or Executive Privilege.
>
> 4. Please state why each person stated in your answer to the preceding interrogatory was advised not to discuss the activities of the Special Investigating Unit by reason of national security or Executive Privilege.

The trial court thereafter prepared its own interrogatories and, on July 9, 1974, requested the President to answer the same. The interrogatories were voluntarily answered and received into evidence as the Court's Exhibits 1 and 2. These exhibits contain general conclusions which reflect that the President had caused the Unit to be formed and that he had given general instructions that the activities of the Unit should not be disclosed. In addition, the President stated that he did not authorize the search and seizure of the office of Louis J. Fielding.

The limited nature of the interrogatories which the court ultimately propounded, and the President's answers

thereto, did not endeavor to treat the issue of specific intent. They dealt, instead, with the President's knowledge of the facts in a most general and non-specific way. Consequently, the probative value of such interrogatories was significantly diminished. Thus, Petitioner Ehrlichman was deprived of meaningful testimony of an exculpatory nature as to both the issues of specific intent and concealment, insofar as specific orders requiring the non-disclosure of the Unit's activities.

The trial court erred both when it failed to require Mr. Nixon to testify at trial and when it failed to permit Ehrlichman to propound detailed interrogatories to the President which would have elicited exculpatory testimony. As early as 1807, Chief Justice Marshall recognized that a subpoena may be directed to the President where his testimony is relevant to a criminal proceeding. *United States v. Burr,* 25 Fed. Cas. 30 (Case No. 14, 692). The separate question of a President's obligation to respond to a subpoena in a criminal proceeding remained untreated, however, until the Court of Appeals for the District of Columbia Circuit addressed that question in *Nixon v. Sirica,* 159 U.S.App.D.C. 58, 487 F.2d 700 (1973).

In *Nixon v. Sirica, supra,* the Watergate Special Prosecutor caused to be issued on July 23, 1973, a subpoena duces tecum upon President Nixon, pursuant to F.R.Cr.P. 17. On July 25, 1973, the President informed Chief Judge John J. Sirica that he considered it inconsistent with the public interest and the constitutional position of the Presidency to comply with this subpoena. Thereafter, the court ordered the President to show cause why the documents should not be produced. Mr. Nixon responded by asserting both executive privilege and the contention that the court lacked the jurisdiction to enter an enforceable order compelling the

compliance with a subpoena. The trial court rejected that contention and, on August 29, 1973, required the President to comply with the subpoena by the production of the items requested for an *in camera* inspection. 360 F.Supp. 1 (1973). The Court of Appeals affirmed Judge Sirica's opinion, noting the ample legal and historical precedent for the proposition that courts have the power to enter mandatory orders to compel members of the Executive Branch to produce certain evidence, subject to executive privilege where applicable.[11]

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[11] The court first pointed out that, in the past, courts have assumed that they have the power to enter mandatory orders to officials of the Executive Branch to compel production of evidence, *citing* United States ex rel. *Touhy v. Ragen,* 340 U.S. 462, 465-466, 472, 71 S.Ct. 416, 95 L.Ed. 417 (1951) (Frankfurter, J. concurring); *Westinghouse Electric Corp. v. City of Burlington, Vt.,* 122 U.S. App. D.C. 65, 351 F.2d 762 (1965); *Boeing Airplane Co. v. Coggeshall,* 108 U.S. App. D.C. 106, 280 F.2d 654 (1960). This Court then went on to state that:

> The Court's assumption of legal power to compel production of evidence within the possession of the Executive surely stands on firm footing. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), in which an injunction running against the Secretary of Commerce was affirmed, is only the most celebrated instance of the issuance of compulsory process against Executive officials. *See, e.g.,* United States v. United States District Court, [supra], (affirming an order requiring the Government to make full disclosure of illegally wiretapped conversations). Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1191 (1828) (issuing a mandamus to Postmaster General, commanding him fully to comply with an act of Congress); State Highway Comm. v. Volpe, 479 F.2d 1099 (8th Cir. 1973) (enjoining the Secretary of Transportation).
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> (continued)

In *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), which dealt with a different Grand Jury subpoena (seeking the production of several additional tapes), this Court effectively affirmed the court's decision in *Nixon v. Sirica* and stated that:

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11 (continued)

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Only last term in Environmental Protection Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), the Supreme Court stated that a District Court 'may order' *in camera* inspections of certain materials to determine whether they must be disclosed to the public pursuant to the Freedom of Information Act. 487 F.2d, at 708-709.

Finally, the Court addressed itself to the historical precedent which supports the proposition that the President can, under appropriate circumstances, be required to comply with a subpoena. In *United States v. Burr, supra*, Chief Justice Marshall clearly indicated that while the President's special interests may warrant a careful screening of subpoenas after the President-interposes an objection, some subpoenas will nevertheless be properly sustained by judicial orders of compliance. As this Court noted, Marshall's opinion in the Burr case 'should put to rest any argument that [Marshall] felt the President absolutely immune from orders of compliance.' 487 F.2d at 710. Eleven years after the Burr case, a subpoena was issued to President James Monroe summoning him to appear as a defense witness in the court martial of Dr. William Burton. At the time, Attorney General Wirt advised President Monroe, through the Secretary of State, John Quincy Adams, that a subpoena could 'properly be awarded to the President of the United States'. Wirt suggested, however, that the President shouold indicate, on the return, that his o his official duties precluded a personal appearance at the court martial. William Wirt to John Quincy Adams, Jan. 13, 1919, Records of the Office of the Judge Advocate General (Navy), Record Group 125, (Records of General Court Martial and Courts of Inquiry,

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"[T]his presumptive privilege [of presidential communications] must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. *To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.*" (Emphasis supplied).

From the foregoing, it can be concluded that Petitioner Ehrlichman had an absolute right to require Mr. Nixon to

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Microcopy M-272, Case 282). In conformance with this advice, President Monroe wrote upon the back of the summons that he would be ready and willing to communicate, in the form of a deposition, any information which he might possess relating to the subject matter in question. President Monroe did, in fact, respond to written interrogatories. As such, the issue of whether or not the the President would be required to appear and testify was not squarely raised.

appear and testify at trial as a "fact witness" with respect to that relevant information which he possessed and the constitutional dilemma which the trial court believed existed should have been resolved in favor of Mr. Nixon's attendance. The court below erred when it did not require Mr. Nixon to so appear. A President is not immune from the laws of this country including the duty to testify in judicial proceedings as a proper fact witness. In limiting Petitioner Erhlichman to the use of interrogatories, and in restricting the use of those interrogatories to the point where Petitioner Ehrlichman was deprived of much exculpatory testimony, the ends of justice were not met and the trial court erred.

CONCLUSION

It is patently clear that the decision by the United States Court of Appeals for the District of Columbia Circuit in effect creates as many questions as it attempts to resolve involving the right to engage in warrantless searches and seizures for the purpose of foreign intelligence information gathering, the constitutionality of 18 U.S.C. §241, the question of intent under that statute together with a failure to fully and properly consider the remaining issues discussed above. In every way possible, both the trial court and the United States Court of Appeals for the District of Columbia Circuit have effectively shrouded the issues by attempting to see that a conviction was rendered and ultimately affirmed. Commencing with the first stage of the case when the defense of national security was announced to the Court, it was rejected. The defense of specific intent was rejected. Discovery was precluded. A fair trial was not obtained. The Petitioner was deprived of his opportunity to obtain defense witnesses. In essence each and every aspect of the defense and its ability to prepare and try its

case was rejected by the Court of Appeals. In the face of the same, there is only one thing that clearly stands out, where there was an opportunity to deprive Petitioner Ehrlichman of his federally protected constitutional rights, that opportunity was fulfilled through a denial.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia was mailed this ____ day of September, 1976 to Charles Ruff, Esquire, Watergate Special Prosecutor, U.S. Department of Justice, 315 9th Street, N.W., Washington, D.C. 20530.

By: _____
WM. SNOW FRATES